FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 30 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 260

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC., a corporation, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408-410 Bunn Building,
Waycross, Georgia,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
A. Summary of the Proceedings	3
B. The Douglas Market	5
C. Allocation of Selling Time	6
D. Change in the Board of Trade's By-Laws Consequent Upon Petitioners' Entry into Business	8
E. Effect of the New System on Petitioners' Business	10
1. The 1954 Tobacco Market Season	10
2. The 1955 Tobacco Market Season	11
3. The 1956 Tobacco Market Season	12
4. The 1957 Tobacco Market Season	13
5. Effect of the 3½% Limitation	14
F. The Rulings Below	15
Reasons for Granting the Writ	19
Conclusion	27
Appendix A—Opinions Below	A1
1. First Opinion, 244 F. 2d 478	A1
2. Second Opinion, 266 F. 2d 636	A24
Appendix B—Judgments Below	A39
1. First Judgment	A39
2. Second Judgment	A40

Page

CASES:

American Federation of Tobacco Growers v. *Neal*, 183 F. 2d 869 22
American Tobacco Co. v. *United States*, 328 U. S. 781 19
Asheville Tobacco Board of Trade, Inc. v. *F. T. C.*, 263 F. 2d 502 ..... 17, 18
Associated Press v. *United States*, 326 U. S. 1 ..... 22, 23, 25
Brown v. *Piper*, 91 U. S. 37 15
Chicago Board of Trade v. *United States*, 246 U. S. 231 ..... 16, 22
City of Lincoln v. *Power*, 151 U. S. 436 15
Currin v. *Wallace*, 306 U. S. 1 19
Day v. *Asheville Tobacco Board of Trade*, 242 N. C. 136, 87 S. E. 2d 18 16
Fashion Originators Guild v. *Federal Trade Comm.*, 312 U. S. 457 22
Federal Communications Comm. v. *RCA Communications*, 346 U. S. 86 16
Hudson Sales Corp. v. *Waldrip*, 211 F. 2d 268 ..... 16, 26
Interborough News Co. v. *Curtis Publishing Co.*, 127 F. Supp. 286 25
International Salt Co. v. *United States*, 332 U. S. 392 ..... 22, 25
Kinnear-Weed Corp. v. *Humble Oil & Refining Co.*, 214 F. 2d 891 ..... 16, 25, 26
Klor's v. *Broadway-Hale Stores*, 359 U. S. 207 ..... 4, 18, 21, 26
McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79 22
Riedley v. *Hudson Motor Car Co.*, 82 F. Supp. 8 25
Shotkin v. *General Electric Co.*, 171 F. 2d 236 ..... 16, 25, 26
Southwestern Sugar v. *River Terms.*, 360 U. S. 411 20
Swift & Co. v. *United States*, 196 U. S. 375 24
Texas & P. R. Co. v. *Pottorff*, 291 U. S. 245 15
Townsend v. *Yeomans*, 301 U. S. 441 19
United States v. *Griffith*, 334 U. S. 100 23
United States v. *United States Smelting Co.*, 339 U. S. 186 20
Wilson Tobacco Board of Trade, Inc., In the Matter of, F. T. C. Docket No. 6262, August 23, 1956 22

STATUTES:

Sherman Antitrust Act, 15 U. S. C. §§ 1, 2, 15 3
Tobacco Inspection Act, 7 U. S. C. §§ 511-511q 19

MISCELLANEOUS: Page

Hough, *Due Process of Law—Today*, 32 Harv. L. Rev. 218 22

Hammell and Seabeck, *Mathematics of Finance*, 13 ... 14

United States Department of Agriculture, Agricultural Marketing Service, *Annual Report on Tobacco Statistics, 1958* (Statistical Bulletin No. 247, March 1959) 33-34 19

Id., *The Auction Marketing of Flue-Cured Tobacco: A Preliminary Appraisal* (Marketing Research Report No. 101, Sept. 1955) 6-7 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*,
Petitioners,

v.

THE DOUGLAS TOBACCO BOARD OF TRADE, INC.,
a corporation, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

B. B. ROGERS, B. S. CORRELL, W. O. NEWELL, *et als.*, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on May 5, 1959.

OPINIONS BELOW

The opinion of the court below on the first appeal (Appendix A, *infra*, pp. A1-A23) is reported at 244 F. 2d 471. The opinion of the court below on the second appeal,

(Appendix A, *infra*, pp. A24-A38) is reported at 266 F. 2d 636.

JURISDICTION

The judgment of the court below on the second appeal (Appendix B, *infra*, p. A40) was entered on May 5, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

A tobacco board of trade that controlled a tobacco market had for 36 years allocated selling time on the basis of the comparative warehouse space owned by its members. It is impossible to sell tobacco on that market without an allocation of selling time. Petitioners, new entrants in the market, built a new and larger tobacco auction warehouse which under the existing system of allocation would have been entitled to 36.36% of the available selling time. After completion of petitioners' warehouse, and five days before the start of the next selling season, the board of trade and the warehousemen other than the petitioners, respondents here, adopted a new system of allocating selling time, aimed at petitioners on its face. The new system limited petitioners to only 14.28% of the total selling time, and prohibited increases and decreases in selling time for future years for each warehouse of more than 3 1-2% of that warehouse's allocation for the previous year. As a matter of mathematical calculation, under the 3 1-2% limitation, it would take petitioners over 27 years, under optimum conditions, to attain to the percentage of selling time which would have been theirs under the system which had been in effect when they built their warehouse and for 36 years prior thereto.

The questions presented are:

1. Whether, in the foregoing circumstances, the adoption and operation of the new by-laws amounted, as a matter of law, to an unreasonable restraint of trade in violation of the Sherman Antitrust Act.

2. Whether, assuming a violation of the Act, the limitation of petitioners' selling time constituted a sufficient public injury to sustain an action for treble damages.

STATUTES INVOLVED

The substantive and treble damage provisions of the Sherman Antitrust Act, as amended—§§ 1, 2, and 15; 15 U. S. C. §§ 1, 2, 15—are set out in footnote 1 of the first opinion below, pp. A1-A2, *infra*.

STATEMENT

A. Summary of the Proceedings.

This is an action for treble damages under the Sherman Antitrust Act, brought by petitioners, independent tobacco warehousemen, against The Douglas Tobacco Board of Trade, Inc., and its members, to redress the violations of the Act growing out of the adoption by the respondents of restrictive by-laws, five days before the 1954 selling season began, which changed to the detriment of petitioners the method of allocating selling time that had been in effect for some 36 years previously, and imposed percentage restrictions on increasing petitioners' selling time in later years. A supplemental complaint was filed to cover the 1955 season, after which the District Court granted a motion to dismiss, and, making findings of fact, entered judgment for the respondents.

On appeal, the court below held that the change in the method of allocating selling time (hereinafter called the entry provision) was a reasonable restraint as applied to the year 1954, but that as to the year 1955 "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse." Accordingly, it reversed the judgment and remanded the case for trial.

for the taking of further evidence "that such limitation tends to prejudice the public interest." Appendix A, *infra*, pp. A1-A23.

With the issues thus limited, the case went to trial on the 1955, 1956, and 1957 selling seasons, the last two seasons having been added by supplemental pleadings.

Following the taking of testimony, the District Court left to the jury four ultimate questions (2R. 600):

> "First, that the three and one-half per cent limit affects interstate or foreign commerce;
>
> "Second, that the three and one-half per cent limit prejudices or tends to prejudice the public interest;
>
> "Three, that the three and one-half per cent limit constitutes an unreasonable restraint of trade; and
>
> "Four, that the plaintiffs have suffered a private injury and been damaged as a direct result of the three and one-half per cent limitation."

These instructions were given on March 6 and 7, 1958, more than a year before this Court's decision in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207.

The jury found for respondents, and petitioners once more appealed. The court below again reversed, primarily because (*infra*, p. A35) "The district court should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute interstate commerce, and should not have left that question to plague and confuse the jury."

With respect to the substantive questions, as will be explained in greater detail later in the Statement, the court below shifted its position materially on each issue. It said on the one hand (*infra*, p. A36), "The strong language which we used on the former appeal in describing the effect of the 3 1 2 per cent limitation * * * should not be construed as any indication of how the jury should

decide that issue, nor permitted to influence the jury's verdict." It also said (*infra*, p. A38) that its earlier holding as to the reentry provision was limited to 1954, "and was not intended to prevent consideration of the new warehouse provision in determining whether the 31 2 per cent limitation for the years 1955 and those following is an unreasonable restraint on trade."

Since, in petitioners' view, the combination of both the entry and the percentage limitations are shown on this record to be unreasonable restraints as a matter of law, the undisputed facts relating to both will now be set forth.[1]

B. The Douglas Market.

Petitioners and the individual respondents are warehousemen engaged in selling tobacco at auction on the Douglas Tobacco Market in Douglas, Georgia (Cmplt. ¶¶ 2-13, 2R. 17-22; Ans. ¶¶ 6-12, 2R. 47-49).

The auction sales of tobacco on that market are controlled and regulated by the individual respondents through the corporate respondent, The Douglas Tobacco Board of Trade, Inc., hereinafter referred to simply as Board of Trade (Cmplt. ¶ 21, 2R. 25; Ans. ¶ 21, 2R. 50). The membership of the Board of Trade is divided into voting and nonvoting members; all of the individual respondents are voting members, and they hold all of the offices of the Board (Cmplt. ¶¶ 5-12, 2R. 18-22; Ans. ¶¶ 5-12, 2R. 47-49).

The Douglas Tobacco Market is one of twenty-three tobacco auction markets in Georgia, and for some years past it has been either the second or third largest in that State, both in respect of volume and gross value of tobacco sold (Def. Ex. 24, 2R. 159-160, 162-164, 169, 176). It is

[1] The testimony and most of the pleadings appear in the record on the second appeal, No. 17,401, in the court below; this will be referred to as 2R. A few additional matters appear only in the record on the first appeal, No. 16,281 in the same court, which will be cited as 1R.

made up of seven tobacco auction warehouses which, except for petitioners', are operated and controlled by respondents (Cmplt. ¶ 6, 2R. 19; Ans. ¶ 6, 2R. 47-48).

Tobacco is brought by the farmer-growers to the warehouses on the Douglas Market, where it is put into baskets, weighed, placed in rows on the warehouse floors (2R. 223) and is thereafter graded by officials of the United States Department of Agriculture, and sold at auction (2R. 574-575).

About 85% of the tobacco sold on the Douglas Market is then shipped from Georgia to other parts of the United States for processing (2R. 224, 342, 370, 474-475, 580). Tobacco, being perishable, is removed from the warehouse floors on the day of sale or the next day, and transported by truck or rail to redrying plants, only one of which, "a very small one", is situated in Georgia (2R. 475; references just cited; and see also 2R. 471, 577).

C. Allocation of Selling Time.

The maximum amount of tobacco that can be sold on the Douglas Market in any one day is 4400 baskets (2R. 225), an amount fixed as follows: Each tobacco company assigns two buyers to the Douglas Market. One buyer for each company makes up a set of buyers. There are thus two sets of buyers on the Douglas Market. Two sales in different warehouses are conducted simultaneously. Each set of buyers can buy a maximum of 2200 baskets a day, tobacco being auctioned at a fixed rate of 400 baskets per hour during the 5½ hours of the selling day, or 4400 baskets per day in the aggregate. (2R. 225, 318, 494, 561.)

Respondents, through the Board of Trade, divide these 4400 baskets of tobacco among the warehouses on the Douglas Market (2R. 225, 317-318). The Board does this by issuing sales schedules (Pl. Ex. 1, 8, 9, 13; 2R. 88, 106, 116) which assign to each warehouse a certain portion of

the selling day during which sales can be held there. On most selling days, this determines the maximum number of baskets that can be sold each day at that warehouse since the tobacco is auctioned at the fixed rate of 400 baskets per hour. Thus, if one warehouse is allotted 10% of the total selling time, it can sell 440 baskets per day. (Pl. Ex. 6, 9, 2R. 105-106; 2R. 225, 318, 494, 561.)

Selling time is vital to the warehousemen because the buyers, without whom the auction sales cannot be conducted, attend only such sales as are held pursuant to the respondent Board of Trade's sales schedules (Cmplt. ¶ 21, 2R. 25; Ans. ¶ 21, 2R. 50). It is impossible to engage in the tobacco auction warehouse business without selling time (2R. 361), and the profit a warehouseman can make depends on his selling time (2R. 588).

On many days during the selling season, there are on hand more than the 4400 baskets of tobacco that the Douglas Market can sell. When the market is in that condition, it is "blocked", and on blocked days the allocation of selling time determines how much tobacco each warehouse can and will sell. (2R. 225, 302-303, 396, 418, 504, 523.)

On days when the market is not blocked, the farmer can bring his tobacco to any warehouse of his choice (2R. 277). While the "vast majority" (2R. 475) of farmers have a particular warehouse where they want to sell their tobacco (2R. 474-475, 497), on blocked days the farmers must and do "go to any place that they can get in" (2R. 523), viz., to a warehouse with selling time available. In recent years, the Douglas Market has been blocked about two-thirds of the time (2R. 395-396).[2]

[2] The breakdown is as follows:

Tobacco Season	No. of Sales Days	No. of Blocked Days
1955	26	21
1956	22	15
1957	16	7

D. Change in the Board of Trade's By-Laws Consequent Upon Petitioners' Entry Into Business.

"The Douglas Georgia Tobacco Market was established in 1918, and has been in continuous existence for 38 years. Each year, selling time has been allocated to the tobacco warehouses operating there by the Douglas Tobacco Board of Trade. Until the tobacco selling season of 1954 which began July 1954, selling time had been allocated to the warehousemen on the 'Unit Floor Space Basis'. Up to 1954, the usual tobacco warehouse was a building approximately 175 feet wide and 315 feet long * * * for a building with a size of 55,125 square feet, * * * the average sized warehouse contained 55,000 square feet and became known as a 'Unit'. Up to 1954 at the Douglas Market, the selling time was allocated in proportion to floor space or number of units of 55,000 square feet owned by the warehousemen."

"In 1954, B. B. Rogers and his five associates, appellants herein [and now petitioners], came to the Douglas Georgia Market and built an enormous warehouse of 220,000 square feet or four units of 55,000 square feet, all in the same building. * * * On the basis of the 'Unit Floor Space', Rogers, *et al.*, expected to receive 36.36% of the entire selling time * * *." Brief of Appellees, The Douglas Tobacco Board of Trade, Inc., *et al.*, in No. 16,284, C. A. 5, p. 8.[3]

[3] This was the present respondents' brief on the first appeal to the court below, which was served on January 8, 1957. The admissions therein just quoted are in substantial accord with the findings of fact made at the first trial (Fdgs. 7 and 8, 1R. 102-103) and the statements in the opinion of the court below on the first appeal (*infra*, pp. A6-A10).

Before petitioners built their warehouse, there were six warehouses comprising seven units (Fdg. 7, 1R. 102); one of the six warehouses was twice as large as the other five (Fdg. 8, 1R. 103). Also, one set of respondents operated two of the smaller warehouses, thus giving them the benefit of two units (Cmplt. ¶ 10, 2R. 21; Ans. ¶ 10

Petitioners' warehouse, known as Big Independent 1, 2, 3, 4, the largest in the Douglas Market, was completed in June 1954 (Cmplt. ¶ 27, 2R. 28-29; Ans. ¶ 27, 2R. 51). The 1954 selling season of that market opened on July 15, 1954 (Cmplt. ¶ 28, 2R. 29; Ans. ¶ 28, 2R. 52).

In the interim, on July 1, 1954, respondent The Douglas Tobacco Board of Trade, Inc., was incorporated, and acquired all the assets and assumed all the liabilities of the former unincorporated Douglas Tobacco Board of Trade (Cmplt. ¶ 3, 2R. 18; Ans. ¶ 3, 2R. 47; Pl. Ex. 21, 2R. 133 [not printed]).

On July 10, 1954, five days before the 1954 selling season opened, respondents at a meeting of the new corporate Board of Trade adopted a By-Law that instituted, in place of the long established Unit Floor Space System, an entirely new method of allocating selling time (Cmplt. ¶ 29, 2R. 29-31; Ans. ¶ 29, 2R. 52; Pl. Ex. 3, 2R. 90-92).

The new system provided that selling time for the 1954 season would be allocated to warehouses with prior selling experience—*i. e.*, all except that owned by petitioners—in the proportion that the total sales of each bore to the total sales on the market for the last two years.

With respect to new warehouses, the new system provided that if such new warehouse were smaller in size than the average of the others in the Douglas Market, it would receive selling time in the proportion that its size bore to the size of all the others, but that if such new warehouse were larger than the average, then it "shall not receive any consideration in selling time for the size in excess of the average of all warehouses and shall in no

2R 49). Accordingly, when petitioners entered the market, there were already two competitors which under the Unit Floor Space System were each allotted 28.55% of the available selling time (Pls. 7-8, 1R. 102-103). Otherwise stated, see Fdg. 7, 1R. 102, each of those competitors operated two units or 110,000 square feet of warehouse space. See also pp. A6-A7, *infra*.

event be allocated more than its equal pro-rata share as it is determined by the number of warehouses operating as hereinbefore set forth" (2R. 91-92).

The new system further provided that for subsequent tobacco seasons the allotted selling time was not to vary more than 3 1/2% from that allotted in the preceding season.

The new By-Laws (Pl. Ex. 3, 2R. 90-92) are set forth in pertinent part in the first opinion of the court below, *infra*, pp. A7-A10.

E. Effect of the New System on Petitioners' Business.

Although the opinion below on the first appeal deals only with the effect of the new system in 1954 and 1955, the 1956 and 1957 seasons being considered pursuant to supplemental pleadings (2R. 76-85), petitioners believe that it will be more convenient if the consequences of the new system for all four years are first set forth, before the two opinions of the court below thereon are stated.

1. The 1954 Tobacco Market Season.

At the time the 1954 season opened, there was a total of 605,000 square feet of floor space available in the Douglas Market, and under the Unit Floor Space System that had been in effect for the preceding 36 years, there were 11 units of selling time available. Under that System, petitioners' Big Independent with its 220,000 square feet of floor space would have received 4 units, or approximately 36.36%, of the available selling time (Exs. 7-8, 1R. 102-103), which meant that petitioners would have received sufficient selling time to sell 1600 baskets of tobacco each day during the season (4400 × .3636 = 1600).

Under the allocation made by respondents pursuant to the new system, petitioners' Big Independent, as a warehouse "larger in size than the average of all warehouses"

(2R. 91); was counted as one warehouse, and, there being seven on the Douglas Market, petitioners were allocated one-seventh or 14.28% of the available selling time (Fdgs. 940, 1R. 103). This limited petitioners to the sale of 628 baskets of tobacco a day during the 1954 season, although, as they alleged, the farmer-growers brought more than that number of baskets to the Big Independent (Cmplt. ¶ 33; 2R. 36).

2. The 1955 Tobacco Market Season.

The 1955 tobacco market season opened on July 21, 1955 (Pl. Ex. 8, 2R. 106) with the same 4400 basket limitation on the total amount of tobacco that could be sold on the Douglas Market in any one day (2R. 225).

For the 1955 season, petitioners' allocation of selling time was increased from 14.27% to 14.77% of the available selling time, or from 628 to 650 baskets of tobacco per day (Pl. Ex. 2, 8, 2R. 89, 106). Respondents arrived at this allocation as follows:

In 1954, the farmers had patronized the Big Independent in such numbers that petitioners, with only 14.28% of the available selling time, actually sold 19.31% of the tobacco traded on the Douglas Market (Pl. Ex. 2, 2R. 89). On the basis of that performance, petitioners under the substantive performance provision of the new By-Laws would have received enough time to sell 850 baskets a day (4400 × 19.31%). But by reason of the 3 1/2% limitation, petitioners were allowed only enough time to sell 650 baskets, computed as follows (2R. 513-515; Pl. Ex. 2, 2R. 89):

	Sales Time	Baskets
Petitioners' 1954 allocation	14.28%	628
Maximum Permitted Increase (3 1/2% of prior year)	.49%	22
Petitioners' 1955 allocation	14.77%	650

The 3 1/2% limitation was applied in like manner to all of the other warehouses, with decreases similarly limited to 3 1/2%, making the 1955 allocations of selling time for the others substantially the same as for 1954 (Pl. Ex. 2, 2R. 89; 2 R. 365-366, 493, 587-588).

During the 1955 season, the market was blocked for 21 out of 26 market days (2R. 395). Except for the 5 unblocked days, the flow of tobacco on the Douglas Market was therefore predetermined and directed by the selling time allocation under the 3 1/2% limitation (2R. 234-235, 384-385, 418, 475-476, 504, 523).

3. The 1956 Tobacco Market Season.

The 1956 tobacco market season opened on July 25, 1956 (Pl. Ex. 9, 2R. 106).

In 1955, the farmers had again patronized the Big Independent in such numbers that petitioners, with only 14.77% of the available selling time, actually sold 15.88% of the tobacco traded on the Douglas Market (Pl. Ex. 6, 2R. 105).

On the basis of that performance, petitioners under the substantive performance provisions of the new By-Laws would have received sufficient time to sell 699 baskets a day (4400 × 15.88%), or an increase of 49 baskets a day over their 1955 allocation (Pl. Ex. 8, 2R. 106).

However, by application of the 3 1/2% limitation petitioners would have been allowed only time to sell 673 baskets, or an increase of 23 per day (650 × 3 1/2% = 23).

But the 3 1/2% limitation of the By-Laws was not followed in actual allocation. Instead of taking the previous percentage of selling time, 14.77%, and applying the 3 1/2% to that, respondents took only the difference between petitioners' 1955 performance of 15.88% and their 1955 allocation of 14.77%—1.114%—and then applied that much smaller percentage to the 1955 allocation. This came

to an increase of only .165% of selling time, i. e., a single minute, or sufficient time to sell 7 additional baskets. (Pl. Ex. 6, 8, 9, 2R. 105, 106.)

The foregoing paragraph is substantiated by the cited exhibits as well as by the admissions (2R. 405-409) of the respondent Loftis, who at all time here material was Secretary-Treasurer of the Board of Trade and as Sales Supervisor of the Douglas Market computed the allocations of selling time (2R. 492, 508).

On 15 of the 22 selling days of the 1956 season, the Douglas Market was blocked (2R. 396), so that there were only 7 days during the 1956 season when the flow of tobacco to that market was not predetermined and directed by the selling time limitation (2R. 234-235, 523). Thus the status quo on the Douglas Market was maintained (2R. 493; Pl. Ex. 6, 8, 9, 2R. 105-106).

4. The 1957 Tobacco Market Season.

The 1957 tobacco market season opened on July 18, 1957 (Pl. Ex. 19, 2R. 125).

In 1956, the farmers had again patronized the Big Independent in such numbers that petitioners, with only 14.93% of the selling time—14.77%, the 1955 allocation, plus the .165% increase allowed in 1956—sold 16.149% of the tobacco traded on the Douglas Market (Pl. Ex. 12, 2R. 115). On the basis of that performance, petitioners should have received sufficient time to sell 711 baskets a day (4400 × 16.149%) or an increase of 54 baskets per day over 1956.

However, by application of the 3 1/2% limitation, petitioners would have been allowed only time to sell 670 baskets, or an increase of 23 per day (657 × 3 1/2% = 22.99).

But under the allocation actually made by respondents, i. e., applying only the difference between petitioners' 1956 performance of 16.149% and their 1956 allocation of 14.93%

—a mere 1.219%—to the 1956 allocation, the increase of selling time granted petitioners came to .18% of available selling time, or an increase of only 8 baskets a day (Pl. Ex. 12, 13, 16; 2R. 115-116, 124).

On 7 out of the 16 selling days of the 1957 season, the Douglas Market was blocked (2R. 396). This meant that on each of those days the flow of tobacco to the Douglas Market was controlled and directed by the selling time limitations imposed by respondents, again maintaining the status quo (2R. 235-236, 493, 523).

5. Effect of the 3½% Limitation.

Even if the 3 1/2% limitation were followed according to its terms, which, as shown above, was not the case in 1956 and 1957, it is a matter of mathematical demonstration that under this limitation it would take petitioners not less than 27 years and three months to reach the 36.36% of selling time that would have been theirs under the Unit Floor Space System in use at the Douglas Market from 1948 to 1954.

On the assumption that petitioners are able each year to obtain the maximum increase of 3 1/2% of their prior year's allocation, the number of years that it would take them to reach 36.36% of the available selling time is a matter of computation under the "fundamental formula of compound interest" (Hummell and Seabeck, *Mathematics of Finance* (1948) 13), which is as follows:

$$S = P\ (1 + i)^n$$

where

S is amount of selling time due at a later date.
P is original amount of selling time.
i is increase for each period.
n is the number of periods involved.

Applying this formula:

$$S = P\ (1 + i)^n$$

$$36.36\% = 14.28\% \times (1 + 3\tfrac{1}{2}\%)^n$$

$$\frac{36.36\%}{14.28\%} = (1.035)^n$$

$$2.546 = (1.035)^n$$

$$\log 2.546 = n \times \log 1.035$$

$$\frac{\log 2.546}{\log 1.035} = n$$

$$\frac{0.4058}{0.0149} = n$$

$$n = 27.23 \text{ years}$$

Otherwise stated—and of course mathematical computations are well within the realm of judicial notice[4]—it would take petitioners 27 years and 3 months while subject to the 3½% limitation to reach the position that would have been theirs under the pre-1954 system.

Under the system actually applied by respondents in 1956 and 1957 (*supra*, pp. 12-14), no exact computation is possible, but then the period would of course be very much longer than 27 years.

F. The Rulings Below.

As has been indicated, the District Court dismissed the complaint, holding that the By-Laws adopted in 1954 were reasonable and hence lawful (Conc. 1-3, 1R. 165-166), and that no cause of action for treble damages was stated because "there has been no showing of injury to farmers, purchasers, consumers or any other member of the public"

[4] See, e.g., *Brown* v. *Piper*, 91 U. S. 37, 42 ("things which must happen according to the laws of nature"; "matters of science"); *City of Lincoln* v. *Power*, 151 U. S. 436, 441 (mortality tables); *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, 254 (banking practices).

and because "facts could not be pleaded which would change plaintiffs' cause of action from an alleged private wrong to one of public injury" (Conc. 4, R. 106-107).

On the first appeal, the court below held (*infra*, p. A19) "it was not unreasonable for the Board of Trade to conclude that the allotment to the newcomer of more than one-third of the total available selling time was inequitable, and instead to allot to it one-seventh of such time, leaving six-sevenths thereof for apportionment among the six other warehouses in accordance with their performances during the preceding year", adding in a footnote, "There was already a surplus of warehouse floor space on the Douglas Market and we think that the newcomer was entitled to no special consideration because of the unusual size of his warehouse." On this phase of the case, the court below relied primarily on *Chicago Board of Trade* v. *United States*, 246 U. S. 231; *Federal Communications Comm.* v. *RCA Communications*, 346 U. S. 86; and *Day* v. *Asheville Tobacco Board of Trade*, 242 N. C. 136, 87 S. E. 2d 18.

As to the percentage limitation, however, the court below took a different view. It said (*infra*, pp. A20-A21, A22), "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse. . . .

"The 3 1/2 per cent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system, and, if further evidence which may be taken upon remand shows that such limitation tends to prejudice the public interest [citing *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 272 (C.A. 5); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891, 894 (C.A. 5); and *Shotkin* v.

General Electric Co., 171 F. 2d 236, 238 (C.A. 10)], it may constitute an undue and unreasonable restraint of trade and commerce."

The judgment was accordingly reversed, and the case remanded for further proceedings (*infra*, pp. A23, A40).

At the outset of the second trial, after the remand, petitioners asked for leave to introduce evidence as to the reasonableness of the entry provision adopted by the respondents in 1954, but the District Court ruled that the first opinion of the Court of Appeals had become the law of the case, and limited the substantive issue to the effect of the 3 1/2% limitation (2R. 206-210). The trial then proceeded under that limitation.

As has been indicated, the District Judge left the question of interstate commerce *vel non* to be determined by the jury, along with three other questions, all of which have already been quoted above, p. 4.

The jury returned a verdict for the respondents, and petitioners once more appealed.

On the second appeal, the court below held at some length, (*infra*, pp. A25-A35) that the district court "should have instructed the jury that auction sales of tobacco on the Douglas Market are a part of, in, and themselves constitute, interstate commerce, and should not have left that question to plague and confuse the jury * * * because, as a matter of law, the auction sales of tobacco are *in* interstate commerce."

On each of the other three points considered by it on the first appeal, the court below changed its earlier position.

1. Apparently under the spell of some of the Fourth Circuit's expressions in *Asheville Tobacco Board of Trade, Inc.* v. *F.T.C.*, 263 F. 2d 502, it modified its former condemnation of the 3 1/2% limitation, saying (*infra*,

pp. A36-A37), "The strong language which we used on the former appeal in describing the effect of the 3 1 2 per cent limitation * * * should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict. * * * The testimony in the present case tends to sustain the Fourth Circuit's view that some limitation on the percentage of gain or loss in any one year is reasonable, and, we think, that question, together with the reasonableness of the particular 3 1 2 per cent limit, as construed and applied by the defendants, must be left to the jury under proper instructions."

2. With respect to the entry provision, the court below, again citing the Fourth Circuit's *Asheville* decision, said (*infra*, p. A38) that "Our holding was, however, limited to the first year, 1954, and was not intended to prevent consideration of the new warehouse provision in determining whether the 3 1 2 per cent limitation for the years 1955 and those following is an unreasonable restraint on trade. For example, that 3 1 2 per cent limitation might be unreasonable if combined with the new warehouse provision, it would operate to unduly discourage desirable building operations."

3. As to the requirement of public injury, the court below, after citing *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, said (*infra*, p. A37): "In restraints, like the present one to which 'the rule of reason' applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. * * * That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman

Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest.'"

This second time also, the judgment was reversed and the cause remanded (*infra*, pp. A38, A40).

REASONS FOR GRANTING THE WRIT

The public interest in the free flow of tobacco in interstate commerce joins with the injury suffered by these petitioners in seeking from this Court clarification, stabilization, and—above all—correction of the Fifth Circuit's twice-repeated failure to deal with the flagrant and indeed crass restraint of trade perpetrated and persisted in by the respondent Board of Trade and its members that is so plainly proved upon the present record.

First. The Douglas Market is one of some 95 auction markets for the sale of flue-cured tobacco in the United States[5] on all of which the allocation of selling time is made by the local tobacco board of trade,[6] i. e., by the warehousemen in each market. The actual mechanics of the sales of such tobacco have been several times described by this Court (*Townsend* v. *Yeomans*, 301 U. S. 441, 443-446; *Currin* v. *Wallace*, 306 U. S. 1, 7-8; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 798-804), and these sales are among those that have been subject to federal regulation since 1935 pursuant to the Tobacco Inspection Act, now 7 U. S. C. §§ 511-511q. The outcome of the present litigation is therefore obviously of concern to many more persons than the parties alone.

---

[5] U. S. Department of Agriculture, Agricultural Marketing Service, *Annual Report on Tobacco Statistics, 1958* (Statistical Bulletin No. 247, March 1959) 33-34.

[6] U. S. Department of Agriculture, Agricultural Marketing Service, *The Auction Marketing of Flue-Cured Tobacco: A Preliminary Appraisal* (Marketing Research Report No. 101, Sept. 1955) 6-7.

Second. Petitioners have been twice before a district court, and have twice appealed, with partial success, to the court below. Their unwillingness to seek review of that court's first judgment plainly does not narrow the scope of the issues now open (*United States* v. *United States Smelting Co.*, 339 U. S. 186, 198-199), and indeed resulted in establishing more fully not only the nature of respondents' practices but also the effect of those practices over a longer period. They submit, therefore, that they should not be subjected to the expense and inconvenience of another trial plus, it may well be, a third appeal. Considerations of sound judicial administration require the questions presented to be resolved now, *Southwestern Sugar* v. *River Term.*, 360 U. S. 411, 415-416, particularly since the court below has shifted its position on each appeal on no less than three points.

1. On the first appeal, the court below held reasonable as a matter of law the entry provision, under which, by a change effected five days before commencement of the market season in the system of allocating selling time that had been in force for 36 years, petitioners were reduced from 36.36% of the available selling time, which would have been theirs under the old system, to only 14.28% under the new (Appendix A, *infra*, pp. A6-A20). At the retrial, the district court, applying "the law of the case" (2R. 206-210), excluded all evidence as to the effect of the reentry provision. On the second appeal, the court below directed consideration of the entry provisions for the later years, on the view that (Appendix A, *infra*, p. A38) "that 3 1/2 per cent limitation might be unreasonable if, combined with the new warehouse provision, it would operate to unduly discourage desirable building operations."

2. On the first appeal, the court below denounced the 3 1/2% freeze limitation in ringing terms (*infra*, pp. A20-

A21): "We can see no justification for the limitation on increases and decreases in selling time to 3 1/2 per cent, meaning, as construed and applied, not 3 1/2 per cent of the total available selling time but 3 1/2 per cent of the selling time allotted to the particular warehouse." But on the second appeal, the court below backtracked perceptibly, saying (*infra*, p. A36), "The strong language which we used on the former appeal in describing the effect of the 3 1/2 per cent limitation should not be construed as any indication of how the jury should decide that issue, nor permitted to influence the jury's verdict."

3. On the first appeal, the court below dealt with the "public interest" concept by saying (*infra*, p. A22) that "if further evidence which may be taken upon remand shows that such [3 1/2%] limitation tends to prejudice the public interest [citing two of its own prior decisions], it may constitute an undue and unreasonable restraint of trade and commerce." On the second appeal, decided after *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, the court below said (*infra*, p. A37), "In restraints, like the present one to which 'the rule of reason' applies, while the jury should not, and cannot properly, reject the policy of the Sherman Act which has been determined by Congress, it must still decide whether the particular conduct is reasonably calculated to prejudice the public interest which that Act is designed to protect. * * * That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or *is reasonably calculated* to prejudice the public interest." [Italics in original.]

Third. Finally, the rulings below fail in numerous respects to give effect to controlling decisions here as to the scope and purpose of the Sherman Act.

I. Inasmuch as it is illegal for a group of competitors to exclude a new entrant altogether (*Associated Press v. United States*, 326 U. S. 1), a rule that has already been applied to a tobacco market, see *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869 (C. A. 4), respondents could not have denied petitioners any allocation of selling time whatever. Could they then limit petitioners by a change in the established method of making such allocations, a change effected after completion of petitioners' warehouse and five days before the new selling season opened?

When entry into a tobacco market is permitted on a fair basis, a new rule is not necessarily bad simply for being new. See *In the Matter of Wilson Tobacco Board of Trade, Inc.*, F. T. C. Docket No. 6262, Aug. 23, 1956. But here, wholly unlike the situation considered in the *Wilson* case, the entry provision denied petitioners all floor space credit "for the size in excess of the average of all warehouses" (*supra*, p. 9). Theirs being the only warehouse in that category, this was in the nature of a "sandbag"[7] directed against them alone. Cf. *McFarland v. American Sugar Ref. Co.*, 241 U. S. 79. And, inasmuch as it reduced their allotment by more than 60%, it surely was not automatically reasonable, as the court below held (*infra*, pp. A13-A14), under the rule of *Chicago Board of Trade v. United States*, 246 U. S. 231, simply because it did not involve price-fixing. Price-fixing is not the only restraint which is unreasonable *per se*, it is similarly unreasonable *per se* to foreclose competitors from any substantial market. E. g., *Fashion Originators Guild v. Federal Trade Comm.*, 312 U. S. 457; *International Salt Co. v. United States*, 332 U. S. 392. And it is surely a disservice to the memory of the author of the *Chicago Board of Trade* opinion to analogize the regulation there

[7] The expression is Judge Hough's. See his *Due Process of Law—To-Day*, 32 Harv. L. Rev. 218, 233.

involved with the entry provision here, or to suggest that the cure for The Curse of Bigness is to be found in a beatification of the status quo effected through the lessening and indeed the petrification of competition.

But the entry provision cannot be considered in isolation. Whatever might have been the situation had the entry provision's shift in petitioners' selling time from 36.36% down to 14.28% been followed by a true performance system thereafter, here the entry provision was combined with a percentage limitation under which, as a matter of mathematics, petitioners under optimum conditions could not have worked their way back to 36.36% until more than 27 years had elapsed (*supra*, pp. 14-15). That indisputable circumstance brings into play the rule that "however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition." *Associated Press* v. *United States*, 326 U. S. 1, 14.

Here the entry provision and the 31 2% limitation were integral features of a plan that plainly hampered competition by freezing the status quo. Respondents' "intent" is therefore immaterial; all that counts is the restraint that resulted from their acts. *United States* v. *Griffith*, 334 U. S. 100, 105. The court below was therefore plainly in error in excluding the entry provision from consideration at the outset, and in permitting it, on the second appeal (*infra*, p. A38) to be considered only as to subsequent years, and then solely for the purpose of determining the reasonableness of the 31 2% limitation.

2. The 31 2% limitation on future increases or decreases was, we submit, properly condemned on the first appeal, and improperly lifted into the realm of arguable

The reference in the first opinion (*infra*, p. A16) to "unneeded warehouse space" does not reflect any facts in the present record.

reasonableness on the second. It should be noted that this limitation was not a percentage of the entire market, but only a percentage of each warehousemen's sales for the prior season. All too plainly, that provision on its face destroyed the incentive to competition inherent in an untrammelled performance system, because it penalized the efficient warehousemen who attracted the farmers' business, and shielded the less efficient from the consequences of their inability to attract customers in a free market. This record plainly establishes that, in each season following their entry into the market, petitioners were allotted substantially less selling time than they had earned as a matter of their performance in the previous season (*supra*, pp. 11-14).

We are not here concerned with the reasonableness of 3 1/2% as an abstract percentage. An interest rate of 3 1/2% would be reasonable anywhere. A margin of error of 3 1/2% might or might not be reasonable depending on the activity concerned; on college examinations it would mean a high A, while in any article machined on a lathe it would result in junk for the scrap heap. This case does not concern abstractions, or interest rates, or examination marks or manufacture; it concerns commerce, which—it cannot be too often repeated—"is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398. Here the course of business shows, first, that with the 3 1/2% limitation of the new by-laws in effect, it would as a matter of calculation take petitioners over 27 years to earn the selling time that would have been theirs under the system in force when they built their warehouse (and in force for 36 years before that); and, second, that respondents so manipulated even that limitation that petitioners' selling time thereafter was virtually frozen. After all, the increases of .165% and .18% in selling time for 1956 and 1957 (*supra*, pp. 12-14) —increases of 7 and 8 baskets a day—were *de minimis*

Respondents had so solidified the allocation of selling time that competition was completely stifled.

Such a restraint—and it is proved by documents and by the testimonial admissions of the respondent Loftis, Sales Supervisor of the Douglas Market—such a restraint, we submit, is unreasonable as a matter of law. The basic facts are not and cannot be disputed, and indeed the present proceeding has advanced far beyond the pleadings and summary judgment stages that were held adequate in, respectively, *International Salt Co.* v. *United States*, 332 U. S. 392, and *Associated Press* v. *United States*, 326 U. S. 1. No jury would be permitted to grant to its neighbors dispensation from the commands of the Sherman Act in respect of the flagrant paralyzing of competition that this record so plainly reveals. The only question open is the extent to which petitioners have been damaged, but that issue, equally plainly, cannot be resolved until this Court has clarified the misconceptions that becloud both the opinions already rendered below.

3. Such clarification is particularly called for in respect of the concept of "public interest" as that concept has been heretofore applied in the present litigation. Originally, the district court held (1R. 106-107) that "Since the complaint does not allege, and there has been no showing of, injury to farmers, purchasers, consumers or any other member of the public, no cause of action has been stated under the anti-trust laws", citing cases,[2] and adding that "it is clear from the record that facts could not be pleaded which would change plaintiffs' cause of action from an alleged private wrong to one of public injury." The court below on the first opinion, citing some

[2] *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 214 F. 2d 891 (C.A. 5); *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 239 (C.A. 10); *Bradley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8, 11 (W.D. Ky.); *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp. 286, 301 (S.D.N.Y.).

of the same cases,[10] appeared to espouse their holdings, insofar as applicable, in substance to the effect that injury to a single plaintiff was an insufficient basis for injunctive relief and treble damages.

Thereafter, *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, cleared the atmosphere by reaffirming the doctrine that, once a violation of the Sherman Act is established, the public wrong inheres in that violation, and it is no defense that the violation injures only a single victim.

It is not at all clear that the court below in its equivocal expressions on the second appeal has fully given effect to the thrust of the *Klor's* holding. See the passage already twice quoted, *supra*, pp. 18-19, 21.

While, as before indicated, we believe that the restraints exposed on this record are unreasonable *per se* and too plain and glaring to present a question of fact for a jury, we deem it important that this Court strip off the verbal barnacles that have too long impeded the proper determination of so many Sherman Act cases. Any unreasonable restraint of competition is a violation of that Act. Therefore, in our view, any such unreasonable restraint constitutes a public injury, since the public is always injured whenever a public law is violated. Only by concentrating on the reasonableness or otherwise of a particular restraint, and by avoiding unhelpful talk about the public interest, talk that inevitably tends to an erroneous concentration on the paucity of victims, will it be possible to eliminate this error, an error that infected the trial judge's reasoning here (1R. 106-107, quoted, *supra*, p. 25), that also does not appear to be wholly absent from the latest views of the court below in this case, and that required reversal by this Court in *Klor's*.

---

[10] *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.* and *Shatkin* v. *General Electric Co.*, both *supra* note 9; *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 272 (C. A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

NORMAN M. LITTELL,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

CHARLES J. ALEXANDER,
1826 Jefferson Place, N. W.,
Washington 6, D. C.,

JOHN G. KOPP,
J. EDWIN PEAVY,
408-410 Bunn Building,
Waycross, Georgia,
Of Counsel.

JULY 1959.